

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

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In the Matter of

Advanced Television Systems  
and Their Impact upon the  
Existing Television Broadcast  
Service

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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) MM Docket No. 87-268  
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**Comments of Citizens for a Sound Economy Foundation, et al.**

Citizens for a Sound Economy Foundation, National School Boards Association, National Taxpayers Union, Media Access Project, Small Business Survival Committee, Consumer Federation of America, Council for Citizens Against Government Waste, the Center for Media Education and People for the American Way Action Fund ("CSEF, et al.") respectfully submit these comments in response to the Commission's *Sixth Further Notice of Proposed Rulemaking*, FCC 96-317 (Released August 14, 1996) ("*Sixth NOPR*").<sup>1</sup> The *Sixth NOPR*, *inter alia*, sets forth the policies and procedures for assigning frequencies for new digital television licenses.

CSEF, et al. directs these comments to two issues raised in the *Sixth NOPR*: 1) whether digital television channels should be assigned to permit the near-immediate recovery of the 60 MHz of spectrum located in the 746-806 MHz band, *i.e.*, UHF channels 60-69 and 2) whether broadcasters should have the exclusive right to use channels that might remain vacant after the second channels are assigned.

CSEF, et al. support the Commission's proposal to recover the Channel 60-69 spectrum

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<sup>1</sup>The signatories to these comments include organizations from across the political spectrum. While these organizations often differ on the proper role of government in regulating mass media, they are united in their opposition to incumbent broadcasters receiving free extra spectrum in the transition to digital television.

immediately and to make it available for other uses.<sup>2</sup> The Commission's proposal to concentrate digital television channels in the core spectrum area of Channels 7-51 constitutes a more efficient assignment of the spectrum that minimizes interference and protects licensees now located in channels 60-69. Given that incumbent broadcast licensees will have the use of 12MHz of spectrum for a yet undetermined length of time, the least the Commission can do now is to ensure that an estimated \$10 billion worth of spectrum is made available for other uses.

In any event, the Commission should not permit broadcasters to have the exclusive right to use any vacant channels that might be available after the digital assignments have been made. To do so would be contrary to the Commission's goals of competition and diversity, and would run afoul of the Supreme Court's holding in *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

**I. THE FCC's "CORE REGION" ALLOTMENT/ASSIGNMENT PLAN WILL BEST SERVE THE PUBLIC INTEREST.**

For a variety of technological and spectrum efficiency reasons, the Commission proposes to locate digital television channels in a "core region" of 270 MHz between channels 7-51. *Sixth NOPR* at ¶19-27. Under this plan, broadcasters which currently have channels outside the core

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<sup>2</sup>There is no consensus among the signatories to these comments on how any recovered spectrum should be utilized. Some of the signatories, including Citizens for a Sound Economy Foundation, National Taxpayers Union, the Small Business Survival Committee and the Council for Citizens Against Government Waste believe that the spectrum should be auctioned and the licensees allowed to use spectrum on a flexible basis. Such auction proceeds would then be used to reduce the national debt. Others, like Media Access Project and the National School Boards Association, believe that a portion of the spectrum should be used to meet public safety needs, and that other portions should be auctioned (with some of the proceeds going to fund noncommercial media and telecommunications) or set aside for use by non-profit organizations and individuals. However, as the Commission itself notes, this matter is not at issue here. *Sixth NOPR* at ¶26.

region, or which are assigned digital channels outside the core region would eventually migrate to a digital channel within that core. *Id.* at ¶21.

A principal advantage the Commission cites in support of the core region plan is that it would eliminate the need to "repack" the spectrum, thereby allowing broadcasters to relocate once, rather than twice. *Sixth NOPR* at ¶25. The option would not only ease the eventual recovery of the spectrum that is now used for analog operations, but would also make immediately available the 60 Mhz of spectrum between UHF channels 60-69, which the Commission notes, could be used for other services. *Id.* at ¶26.

CSEF, *et al.* strongly support the Commission's core region allotment/assignment proposal. First, to the extent that it will obviate the need for later repacking, it will permit swifter recovery of the analog television channels, which could then be used for other purposes. Second, to the extent that it permits recovery of channels 60-69 for other uses, it would provide some immediate compensation for the broadcasters' use of 12 MHz of the airwaves for an as yet undetermined period of time.<sup>3</sup> While the Commission states that it will not decide here whether to reallocate these channels for other uses in this proceeding, *Sixth NOPR* at ¶26, CSEF, *et al.* urge the Commission to do so as soon as possible in a subsequent proceeding, in the event it adopts the core region proposal.

On the other hand, the broadcasters' allotment/assignment proposal does not attempt to use spectrum efficiently, or maximize its value to the public. Nor does it attempt to facilitate

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<sup>3</sup>The excellent technical characteristics of the spectrum between channels 60-69 make it attractive to potential bidders: estimates are that the auction could bring upwards of \$10 billion. *E.g.* McConnell, UHF spectrum: telecom's new hot property; FCC will kick off debate over channels 60-69 this week. *Broadcasting & Cable*, July 29 1996 at 20.

the eventual availability of the current analog channel for other uses. But the Commission's proposal more than meets broadcasters' needs: it provides each broadcaster with a matching channel in a portion of the spectrum that is best suited for the provision of digital television, it minimizes interference, and minimizes the disruption of moving channels more than once. *Sixth NOPR* at ¶¶24,32. Importantly, the proposal would specifically protect the relatively few licensees currently operating in channels 60-69 from interference. *Sixth NOPR* at ¶26.<sup>4</sup>

The Commission must view the broadcasters' allotment/assignment proposal in light of the broadcasters' unyielding opposition to all auction plans, and its transparently self-serving insistence on an extended transition period of free dual channel use. The industry's plan suggests that its true objective may be to grab as much spectrum as possible now in the hope of keeping 12 MHz of spectrum in the future. While the *Fourth Further Notice of Proposed Rulemaking and Third Notice of Inquiry*, 10 FCCRcd 10541 (1995) ("*Fourth NOPR*") addresses transition and spectrum recovery issues more directly, this proceeding provides the Commission with another opportunity to ensure that the first channel is made available for other uses.

## II. THE COMMISSION SHOULD NOT GIVE BROADCASTERS THE EXCLUSIVE RIGHT TO USE VACANT CHANNELS.

The Commission recognizes that during, and especially after, the transition to digital television, one or more channels may remain vacant in certain (especially rural) communities. *NOPR* at ¶150. Therefore, the Commission asks whether and how it should make those channels

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<sup>4</sup>To make the transition for those stations now located in channels 60-69 even easier, the Commission proposes to require new licensees in those channels to compensate those stations for the cost of relocating to DTV channels in the core region. *Sixth NOPR* at ¶26.

available. *Id.* at ¶51. The Commission requests comment on possible uses, including, *inter alia*, "permitting existing broadcasters, either individually or jointly, to use the available channel or channels for additional broadcast or subscription programming[.]" *Id.*

While the signatories to these comments may not agree on the use to which these extra channels should be put, *see* footnote 2, *supra*, they do agree on one guiding principle: broadcasters should not be given even more free spectrum than they will already receive through the proposed assignment of a second digital television channel. The Commission may choose to make the spectrum available to displaced Low Power TV stations, to mutually exclusive applicants, or, if Congress permits, to competitive bidders and/or for flexible use. But giving broadcasters the exclusive right to this spectrum runs contrary to two of the Commission's oft-stated goals - the promotion of competition and viewpoint diversity. Moreover, it is contrary to the holding of *Ashbacker Radio Corp v. FCC*, *supra*, which prohibits the Commission from limiting the eligibility for new spectrum to incumbent licensees.<sup>5</sup> The Commission should forcefully reject any suggestion that broadcasters, alone, have any right to vacant frequencies.

### CONCLUSION

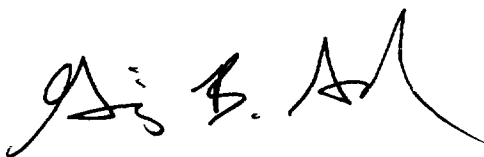
The Commission must not permit this important phase of its digital television proceeding to be a vehicle through which broadcasters grab even more free spectrum than the extra channel

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<sup>5</sup>In response to the *Fourth NOPR*, MAP and other organizations argued that the holding of *Ashbacker* prohibits the Commission from giving incumbent broadcasters the exclusive right to use the second "digital" channel in the first instance. *See* Comments of Media Access Project, Consumer Federation of America, Minority Media and Telecommunications Council and National Federation of Community Broadcasters, filed November 20, 1995 at pp. 10-13. The same principles apply with even greater force here, since broadcasters can not plausibly argue here, as they did previously, that use of an extra vacant channel is a mere exchange of one frequency for another.

they are already asking for (and appear likely to receive). If, as the Commission states, its two overarching goals here are to "ensure that the spectrum is used efficiently and effectively through reliance on market forces and to ensure that the introduction of digital TV fully serves the public interest," then its choices are clear. First, it should adopt its "core region" plan in the interests of both spectrum efficiency and compensating the public. Second, if the Commission is indeed, "relying on market forces," it must not permit broadcasters to have the exclusive right to use any vacant channels that may be available prior to, or after the transition to digital television.

Respectfully submitted,



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